

Internal Revenue Service

memorandum

CC:TL-N-9060-89

Br4:RJFitzpatrick

date: **OCT 27 1989**

to: District Counsel, San Francisco W:SF
Attn: Ms. Murphy

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This responds to your request for tax litigation advice on whether your proposal for settlement of the above-entitled action is appropriate. You recommend that the petitioner be offered fees of \$ [REDACTED]. This amount does not include amounts incurred for the appellate proceeding nor amounts resulting from failure to comply with the Tax Court rules.

By memorandum dated December 29, 1988, we previously provided your Office advice on this matter. Our Office advised that the hazards of litigation leave room for settlement in this case. Although we acknowledged that Collection did not appear to have proceeded with any enforced collection in this case, we felt that hazards of litigation still warranted consideration of settlement or concession, subject to substantiation and reasonableness, of attorney fees regardless of how gently collection activities were pursued after the petition in this case was filed. We also agreed that your reference to Powell v. Commissioner, 91 T.C. 673 (1988) was a proper interpretation of how this case should proceed in the partial defense of petitioner's request for attorney fees. We stated that the analysis of the "reasonableness" of the government's appellate court proceeding should be viewed separately from the Tax Court proceeding.

We do not believe the petitioner has any basis to justify attorney fees at the appellate proceeding for the government's defense of petitioner's request for attorney fees. The Service's defense of such a request was based upon then existing case law and in our view was reasonable. We acknowledge that Animal Lovers Volunteer Association v. Carlucci, 867 F.2d 1224 (9th Cir. 1989) and Greater Los Angeles Council on Deafness v. Community Television, 813 F.2d 217 (9th Cir. 1987), lends some support for petitioner's assertion that the Tax Court proceeding and the appeal in this case should not be viewed separately. Nevertheless, we concur with your view that Powell

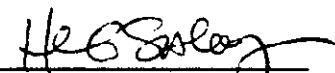
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provides the Service with ample support for its position that the Tax Court proceeding and the Appellate proceeding should be analyzed independently. We see no reason to compromise this position in our offer. Additionally, although we concur with your Office's view that petitioner's hourly rate of \$[REDACTED] be part of the offer to facilitate settlement of this case, in the event petitioner rejects this offer consideration should be given to opposing the reasonableness of this hourly rate.

With regard to the petitioner's failure to follow T.C. Rule 231, the petitioner was required to file a motion to vacate in order to properly request attorney fees. We concur with your view that the motion to vacate is attributable to petitioner's failure to comply with the court rules and accordingly subtraction of one hour from the hours claimed by petitioner is reasonable.

In sum, we believe your offer in compromise accurately reflects the hazards of litigation in this case and we agree that your proposal of \$[REDACTED] plus costs be offered to petitioner to settle this case. If you have any questions concerning this advice, please contact Robert Fitzpatrick at FTS 566-3345.

MARLENE GROSS
Assistant Chief Counsel
(Tax Litigation)

By: 
HENRY G. SALAMY
Chief, Branch No. 4
Tax Litigation Division

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